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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966.

No. 994

RUSSELL W. BORROWDALE,

*Petitioner,*

*vs.*

HOWARD R. REULAND,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner Russell W. Borrowdale prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

### OPINIONS BELOW.

The Seventh Circuit's opinion below is not yet reported but is reproduced in Appendix "A" infra.

### JURISDICTION.

The judgment of the Court of Appeals was entered November 3, 1966. Petitioner's timely petition for rehearing was denied December 5, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

I.

In order to comply with the provisions of Admiralty Rule 9 of the United States Supreme Court, there shouldn't be any fact question of waiver, only the question of was there a hearing in compliance thereof.

II.

Are the provisions of Admiralty Rule 10 of the United States Supreme Court complied with where the record does not support and the court failed to make a finding that certain articles were on board when in July of 1964 the vessel and her appurtenances were seized and attached?

III.

Whether the District Court's jurisdiction over the person of R. W. Borrowdale, as limited by the res or property seized ceased on October 4, 1965 when the successful claimant, Howard R. Reuland deposited a Stipulation for Value in the amount of $40,000, to secure the release of the said vessel, and said vessel departed from the jurisdiction of the District Court and thereafter was without jurisdiction of the subject matter seized and the person of Russell W. Borrowdale, the court's jurisdiction as of that date and thereafter being in rem only, over the amount of Stipulation for Value deposited with the court.

IV.

That the finding of contempt is not supported by clear and convincing evidence, that the moving party Howard S. Reuland did not sustain his burden of proof.

## STATUTES INVOLVED.

U. S. C. A. 1950 Ed., page 90 Title 28, Rule 9:

RULE 9. *Monition to third parties in suit in rem.*

In all suits in rem against a ship and/or her appurtenances if her appurtenances or any of them are in the possession or custody of any third person, the court shall, on due notice to such third person and after hearing, decree that the same be delivered into the custody of the marshal or other proper officer, if on hearing it appears that the same is required by law and justice.

U. S. C. A. 1950 Ed., page 90 Title 28, Rule 10:

RULE 10. *Process in suits in rem.*

In all cases of seizure, and in other suits and proceedings in rem, the process, if issued and unless otherwise provided for by statute shall be by a warrant of arrest of the ships, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

## STATEMENT OF CASE.

The jurisdiction of the district court was invoked because of the nature of the original actions, both of which arose under the exclusive admiralty and maritime jurisdiction of the district court.

Petitioner Borrowdale and Respondent Reuland were adverse claimants in consolidated admiralty actions commenced in the District Court in 1964 by libelants E. Gene

Crane and Curt Herberts against the vessel Happy Pappy to enforce maritime liens. Borrowdale and Reuland each sought to be declared the owner of the Happy Pappy and her appurtenances and to be allowed to defend the suits on behalf of the vessel. On September 25, 1965 the court, after hearing evidence on the issues of ownership and right to possession, entered findings of fact, conclusions of law, and a decree and order, declaring Reuland to be the lawful owner and entitled to possession of the vessel and her appurtenances. On September 30, 1965, Borrowdale, who had temporary possession of the vessel as custodian for the court, delivered the Happy Pappy to Reuland, who had been adjudged owner and was appointed custodian of the vessel until its release to him upon the execution and filing of an approved stipulation for value in the amount of $40,000, to secure Borrowdale's claim for liens against said vessel in excess of $30,000, as well as other lien claimants, who asserted liens against the same said vessel in an amount in excess of $13,000.00

On October 1, 1965 a motion was filed for an order to show cause (B. A. 13)* why the former custodian of the vessel Happy Pappy, Russell W. Borrowdale, the petitioner herein should not be held in contempt for the alleged removal of certain articles from the vessel in question of which he was alleged to be custodian thereof, the allegations stated that the property in question was removed from said vessel sometime between the period of September 23 and September 30, 1965.

It has always been petitioner's position that the articles in question were not removed during the period in question having been removed prior to the vessel's seizure by the U. S. Marshal, that the articles in question were not part of the vessel, that they were not lawfully seized and

* B. A.—Borrowdale Appendix.
R. A.—Reuland Appendix.

therefore not properly before the court, that the U. S. Marshal could not release from custody articles over which he never obtained custody or possession; but that the items in question were the property of the petitioner having been separately purchased, and not a part of the vessel (B. A. 56) (B. A. 58-59) (B. A. 61-62).

On October 6, 1965, by stipulation of the parties the order of October 1, 1965 directing the petitioner to return certain articles to the vessel Happy Pappy by October 4, 1965 was vacated (B. A. 20) and the motion upon which said order was entered was continued until October 8, 1965.

On October 8, 1965 the petitioner on examination by his then counsel stated not only that the articles in question had not been seized, but that in fact he had purchased said articles from the vessel's captain at the port of New Orleans, who seized and sold same in settlement of his wages. This purchase was made after a telephone conversation with a Mr. Dodge, who at that time had sold the vessel to the petitioner, but had not formally consummated the contract of sale (B. A. 61-62). After hearing this testimony (B. A. 57-59) (B. A. 61) the court adjourned the hearing and recommended that the litigants attempt to resolve the matter to their mutual satisfaction (R. A. 78), which they apparently did and later that day they returned to court (B. A. 60) and announced that an agreement was reached with respect to the items of personal property, which could be incorporated into the form of an order which could be presented to the court; and thereafter on that same day, the Rule to Show Cause was discharged. However a draft order setting forth the terms and conditions of the alleged agreement between the parties on that Oct. 8, 1965 was never presented to the Court. During the period of October 8, 1965 to November 9,

1965 in the absence of an order reducing the agreement of October 8, 1965 to writing, no other evidence was heard as to the ownership of the property in question and no determination was entered therein.

In the ensuing period the vessel left Chicago on October 3, 1965, a Stipulation for Value in the amount of Forty Thousand ($40,000.00) Dollars being filed on October 4, 1965, at which time it was stated that the vessel was still within the jurisdictional waters of the District Court.

On November 9, 1965 respondent Reuland filed a motion for an order directing the United States Marshal to release from custody the following described equipment, alleged to be appurtenances of the Vessel Happy Pappy (B. A. 22-24) and on that same day an order to that effect was entered (B. A. 25).

1. Thirteen foot Boston Whaler and brackets for same, and

2. Two Fish-fighting chairs.

Appellant declined to deliver the aforesaid Articles to the U. S. Marshal for the following reasons.

(a) They were never seized by the U. S. Marshal under the monition issued in the libel in rem actions against the vessel.

(b) There was no hearing and determination pursuant to admiralty Rule 9, that in fact the articles in question were appurtenances of the vessel Happy Pappy.

(c) That the order of November 9, 1966 directing the U. S. Marshal to release the aforesaid articles from custody characterized as a turn-over order, was of no force and effect since it was not based on any order finding ownership in respondent Reuland pursuant to admiralty Rule 9, and not

having been seized under process, was not in the possession or custody of the U. S. Marshal at any time during the proceedings.

(d) On October 4, 1965, the successful claimant, Howard R. Reuland, deposited a Stipulation for Value in the amount of $40,000.00, to secure the release of the said vessel, and then left the jurisdiction of the District Court. On that said date, the District Court's jurisdiction over the person of R. W. Borrowdale, as limited by the res or property seized, ceased and thereafter was without jurisdiction of the subject matter seized, and the person of Russell W. Borrowdale; the court's jurisdiction as of October 4, 1965 and thereafter was in rem only, over the Stipulation for Value deposited with the court (*J. K. Welding Co. Inc.* v. *Gotham Marine Corporation*, 47 F. 2d 332).

On motion of respondent Reuland, a Rule to Show Cause was entered against petitioner Borrowdale, and on December 10, 1966 the issue was tried; the district judge finding Russell W. Borrowdale in contempt of Court and on January 7, 1966 entered an order fining him Two Thousand Five Hundred ($2,500.00) (B. A. 5-6) and on appeal the judgment orders of the District Court appealed from were affirmed; costs on appeal together costs of printing additional transcript of record and additional appendix as well as reasonable expenses incurred in the defense of this appeal including reasonable attorneys fees and other items of litigation expense were allowed respondent Reuland (Appendix "A" *infra*, p. 8).

## REASONS FOR GRANTING THE WRIT.

### I.

There are remarkably few cases dealing directly with Admiralty Rule 9. In the *George Prescott,* 10 Fed. Cases 222 (5,339) at page 223 it stated:

> "A motion was accordingly issued, citing Johnson and Smith to appear and show cause why they should not produce the sails and bedding of the vessel."
>
> "Upon the return of the order and monition the master, crew and purchaser of the vessel at the marshal's sale appeared and submitted affidavits tending to contradict the statements made in the moving papers."

He admitted removing the sails and selling them justifying on the ground that he held a mortgage on the vessel, and was ordered to pay the proceeds into court. Cf. *United States* v. *The Zarko,* 187 F. Supp. 371 (S. D. Calif. 1960) where an armature belonging to a vessel subject to a preferred ship mortgage was in possession of a repairman claiming a lien. It is evident that though the rule has had a limited career in the reported cases, it is a potentially important one, with the widespread increase in sales of pleasure craft of all sizes and description, together with the innumerable transactions relating to equipment purchased for and to be installed on said pleasure craft, the rights of thousands of owners, purchasers and vendors of equipment for same are involved, and in light of the record of only two reported cases in ninety-five years, it is important that this Honorable Court construe this rule; that in order to comply with the provisions of admiralty Rule 9 in force on the date in question, there shouldn't be any fact question of waiver, only the question of was there a hearing in compliance thereof, and the Court of Appeals was in error in stating in its opinion

p. 4, that it was wholly unnecessary for the Court to resolve any factual issues in this connection, in view of the fact that the trial court failed to hold a hearing and enter a ruling on the ownership of the personal property in question pursuant to the said Admiralty Rule 9.

## II.

The provisions of admiralty Rule 10, are the means by which each and every maritime action with few exceptions are instituted, and for the Court of Appeals to hold that the provisions of admiralty Rule 10 are complied with, where the record does not support and the court failed to make a finding that certain articles were on board when in July 1964 the vessel and her appurtenances were seized and attached, is error of the type that could affect so many actions in the future to merit the importance of this Honorable Court's review. The Court of Appeals ruling that jurisdiction over the specific res which was the subject of the November 9, 1965 order, if it did not independently exist, and from the Court's Opinion p. 4 and from the record (B. A. 56) (B. A. 58-59) (B. A. 61) it is evident that it didn't exist, was conferred by the waiver and consent implicit in appellants agreement in open court to deliver the articles to the appellee, and that an order so directing might be entered, is clearly erroneous and not sustained by the record (B. A. 60), in view of the fact that the trial court failed to make a finding that these articles were on board when, in July of 1964, the vessel and her appurtenances were seized and attached pursuant to monitions issued in the libel in rem actions against the vessel.

## III.

The statement in the Court of Appeals' opinion Appendix "A" *infra* on page 4 "And, it is obvious that the court had jurisdiction of the person of the appellant, is correct only as it relates to proceedings had prior to October 4, 1965. The Court's reference to its jurisdiction of the persons of the appellant subsequent thereto, particularly in reference to the proceedings had on October 8, 1965 and the order entered on November 9, 1965 is in error, and in direct conflict with the case of *J. K. Welding Co., Inc.* v. *Gotham Marine Corporation,* 47 F. 2d 332 (S. D. N. Y., 1931) which held "that where claimant of arrested vessel filed stipulation for value, admiralty courts jurisdiction is not personal over claimant, but in rem over amount of stipulation."

On October 4, 1965 claimant Howard R. Reuland deposited a stipulation for value to secure the release of the vessel in question. This stipulation covered the said vessel plus all articles and equipment pertaining to same or otherwise belonging to it. By this act of posting the bond, he substituted in place of said vessel a $40,000 Bond, out of which all liens and other claims were to be satisfied.

At page 335 of the opinion it states:

> "It has been held by the United States Supreme Court on a number of occasions that the bond is a substitute for the res, so that in any given case the Court can exercise as much authority over it as if the vessel itself were in the custody of the Court, but no more."

In view of the conflict between the 7th Circuit Court of Appeals and that of the District Court of the Southern District of New York, and for the further reason that a conflict apparently exists between the 7th Circuit Court of Appeals and the United States Supreme Court in several instances is in petitioner's humble opinion of sufficient importance to merit this Honorable Court's review.

## IV.

The statement in the Court of Appeals opinion Appendix "A" *infra* on p. 6 that "the existence of a conflict on the testimony of witnesses does not, where credibility is involved, negate the clear and convincing quality of the credited evidence" does not overcome the failure on the part of the moving party to sustain his burden of proof, and the fact that the finding of contempt is not supported by clear and convincing evidence (B. A. 62-74). The finding of the Court of Appeals is erroneous, and in conflict with the following decisions of other circuits.

The facts necessary to establish contempt must be established by clear and convincing evidence, *Fox* v. *Capital Co.*, 96 F. 2d 684, 686; that is more than a mere preponderance of the proof, *Kansas City Power & Light Co.* v. *N. L. R. B.*, 137 F. 2d 77; doubts should be resolved in favor of defendant, *Fox* v. *Capital Co., supra.*

In view of the record on behalf of petitioner (B. A. 62-74) which shows the Court of Appeals ruling to be clearly erroneous and in conflict with settled law in other circuits, petitioner submits that this merits the importance of this Honorable Court's review.

## CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 18, 1967.

# APPENDIX.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

September Term, 1966—September Session, 1966.

No. 15621

E. GENE CRANE,
*Libelant,*
*vs.*
THE GAS SCREW HAPPY PAPPY,
Official No. 294475, et al.,
*Respondent.*

CURT HERBERTS, d/b/a HERBERTS INTERNATIONAL MARINE,
*Libelant,*
*vs.*
THE GAS SCREW HAPPY PAPPY,
Official No. 294475, et al.,
*Respondent.*

HOWARD R. REULAND,
*Claimant-Appellee,*
RUSSELL W. BORROWDALE,
*Intervening Petitioner and Claimant-Appellant,*
R. W. BORROWDALE COMPANY,
*Intervening Petitioner and Claimant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

NOVEMBER 3, 1966.

Before HASTINGS, *Chief Judge*, and CASTLE and FAIRCHILD, *Circuit Judges*.

CASTLE, *Circuit Judge*. Russell W. Borrowdale, appellant, prosecutes this appeal from a judgment order of the District Court finding him guilty of contempt and ordering that he deliver certain described property, and pay a fine of $2500, to Howard R. Reuland, the appellee, and that in event of failure to deliver the property and pay the fine within a period of five days, Borrowdale be thereafter imprisoned until he complies with such order.

Borrowdale and Reuland were adverse claimants in consolidated admiralty actions commenced in the District Court in 1964 by libelants E. Gene Crane and Curt Herberts against the vessel Happy Pappy to enforce maritime liens. Borrowdale and Reuland each sought to be declared the owner of the Happy Pappy and her appurtenances and to be allowed to defend the suits on behalf of the vessel. On September 29, 1965, the court, after hearing evidence on the issues of ownership and right to possession, entered findings of fact, conclusions of law, and a decree and order, declaring Reuland to be the lawful owner and entitled to possession of the vessel and her appurtenances. On September 30, 1965, Borrowdale, who had temporary possession of the vessel as custodian for the court, delivered the Happy Pappy to Reuland, who had been adjudged owner and was appointed custodian of the vessel until its release to him upon the execution and filing of an approved stipulation for value in the amount of $40,000.[1]

On October 1, 1965, Reuland filed a motion for an order directing Borrowdale to show cause why he should not be held in contempt for failure to deliver with the vessel

1. The approved stipulation for value was filed October 4, 1965, and the vessel released from custody.

a 13 foot Boston Whaler (dinghy), the brackets by which the dinghy was attached to the vessel, and two fish-fighting chairs, alleged to be appurtenances of the vessel and to have been removed from the vessel prior to her delivery by Borrowdale to Reuland. The record discloses that the items in question were removed from the vessel by Borrowdale.

The judgment order appealed from was entered following a hearing on a subsequent rule to show cause issued upon a petition filed by Reuland on November 19, 1965, that the appellant, Borrowdale, show cause why he should not be held in contempt for willful defiance and resistance to a November 9, 1965, order of the court directing him to deliver the dinghy, its brackets, and the fish-fighting chairs to William Fournier, as agent of Reuland. The District Court made and entered findings of fact that, among other things:

> On October 8, 1965, the hearing on the aforementioned Order to Show Cause [the rule issued on Reuland's October 1, 1965, motion] was held. After the hearing of evidence, it was agreed by and between the parties in open Court, that Russell W. Borrowdale would deliver to Howard R. Reuland the thirteen (13) foot Boston Whaler and brackets for same, and two fish-fighting chairs. At this time, the said Russell W. Borrowdale was physically present in Court. Thereafter, this Court discharged the Rules to Show Cause why Russell W. Borrowdale should not be held in contempt for his failure to comply with the Court's Order to deliver the aforesaid property and for his representations to the Chicago Police Department, Illinois State Police, and United States Marshal that he was the owner of the vessel, entitled to possession, and that the vessel had been stolen by Howard R. Reuland.
>
> On November 9, 1965, without opposition, this Court entered a further Order directing delivery of the aforementioned property to William Fournier, an agent for Howard R. Reuland.

The findings recite repeated attempts of William Fournier to obtain delivery of the property from appellant, and that:

> Mr. Borrowdale repeatedly refused to comply, although he acknowledged that he had possession of the property.
>
> Howard R. Reuland has incurred expenses, losses and other damages as a result of the foregoing acts of Russell W. Borrowdale in the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

The appellant seeks reversal of the District Court's contempt adjudication and order on the basis of contentions that the court did not have jurisdiction of the res which was the subject matter of its November 9, 1965, delivery order; that failure to give timely notice of the presentation of the November 19, 1965, petition, for a rule to show cause resulted in substantial prejudice to the appellant; that the finding of contempt is not supported by clear and convincing evidence; and that the award of $2,500.00 to appellee as compensation for losses, expenses and damages is excessive and unwarranted.

The appellant's argument that the court lacked jurisdiction of the res (the dinghy, its brackets, and the fish-fighting chairs) is predicated upon the premises that the record does not support, and the court failed to make, a finding that these articles were on board when, in July of 1964, the vessel and her appurtenances were seized and attached pursuant to monitions issued in the libel in rem actions against the vessel. In this connection the record does disclose that these articles were on board and a part of the vessel's equipment and fixtures in 1963 when appellant brought her from New Orleans to Chicago, and that they were removed by the appellant while he was in possession of the vessel. There is inconsistency in Borrowdale's testimony as to whether he removed the articles in the month preceding his delivery of the vessel to Reuland on Septem-

ber 30, 1965, or whether they had been removed prior to the July 1964 seizure and attachment of the vessel. But it was wholly unnecessary for the court to resolve any factual issue in this connection. The appellant agreed in open court on October 8, 1965, to turn the articles over to the appellee, and that an order incorporating such agreement would be presented to the court. And, appellant did not oppose entry of the November 9, 1965, turn-over order. Appellant does not question the court's jurisdiction over the vessel or of the subject matter generally. And, it is obvious that the court had jurisdiction of the person of the appellant. He not only had intervened as a petitioner claimant in the libel in rem actions and thereby became a party to the consolidated proceedings, but in addition, pursuant to stipulation of the parties and order of the court, he was designated the court's custodian in possession of the vessel and her appurtenances, subject to the court's further order. Jurisdiction over the specific res which was the subject of the November 9, 1965 order, if it did not independently exist, was conferred by the waiver and consent implicit in appellant's agreement in open court to deliver the articles to the appellee, and that an order so directing might be entered. *Reed* v. *Steamship Yaka,* 3 Cir., 307 F. 2d 203, 204-205.[2]

We perceive no merit in appellant's contention that appellee failed to serve timely notice of the presentation of the November 19, 1965, petition for a rule to show cause, and that appellant was substantially prejudiced by not having received at least five days notice. Notice of the motion was served November 18, 1965, upon appellant's then counsel of record in conformity with and as permitted by Rule 12 of the General Rules of the United States

2. Reversed on other grounds, *Reed* v. *The Yaka,* 373 U. S. 410, the reversal, in effect, confirming the jurisdiction of the District Court over the vessel despite the absence of any attachment or stipulation for value.

District Court for the Northern District of Illinois. At the same time, and as a courtesy, notice was also served on appellant's present counsel. Counsel for appellee had been informed on the preceding day that appellant was effecting a change in counsel.

Moreover, no prejudice to appellant resulted. Appellant's then counsel appeared for him on November 19, no objection was made to the adequacy of the notice, and although the rule to show cause issued it was not made returnable until December 3, 1965. Appellant's present counsel, although advised on November 19, that the rule had issued, did not enter his appearance until December 1, and on December 3, obtained a continuance of the matter until December 10, 1965. There is no basis for the contention that the lack of an additional four days notice of the presentation of the motion for a rule to show cause occasioned any prejudice to the appellant.

The contention that the finding of contempt is not supported by clear and convincing evidence is bottomed on appellant's claim that his October 8, 1965, agreement, made in open court, to deliver the articles in controversy to the appellee was contingent upon the appellee's first posting an additional bond, which appellee failed to do. Such contention ignores the fact that the order of November 9, 1965, directing that the dinghy, its brackets, and the fish-fighting chairs be delivered to appellee, which was entered without objection on the part of appellant, contained no such qualification. Moreover, the colloquy which appears in the transcript of October 8, proceeding, and in which the agreement was announced, contains no mention of any prerequisite that the appellee post additional bond.

The testimony of the appellant, and that of an employee of the appellant, given at the December 10, 1965, hearing on the rule to show cause, to the effect that there was an understanding, as part of the October 8, agreement, that

appellee was to post an additional bond in the amount of $3000 is in direct conflict with the testimony of the counsel for the appellee with whom the agreement for the posting of an additional bond was supposedly reached. He denied any such agreement, and denied that any conversation with the appellant, or with anyone else, on the subject of an additional bond took place, except that when the witness and William Fournier and a deputy marshal went to Borrowdale's plant on November 18, 1965, to secure possession of the articles, Borrowdale stated at that time that he wanted an additional bond put up. That any credibility issue relevant to the court's ultimate findings which may have been presented by this conflict in testimony was resolved adversely to the appellant is evident from the trial judge's statement at the conclusion of the December 10, hearing with respect to the appellant:

> "But what bothers me about your client [Borrowdale] is that having, in effect, defied the order of the court and defying the marshal, and, in effect, taking the law into his own hands, I have also reached the conclusion that in making the statements that he has made here from the witness stand that he committed perjury as well."

The existence of a conflict in the testimony of witnesses does not, where credibility is involved, negate the clear and convincing quality of the credited evidence.

The record clearly demonstrates that appellant refused to comply with the November 9, 1965, order of the District Court that the dinghy, its brackets, and the fish-fighting chairs, be delivered to the appellee. We find nothing in the record, when examined and appraised in the context of the contentions of appellant, which discloses any legal infirmity in that order. But, in any event, it is pertinent to note in this connection that in *United States* v. *United Mine Workers of America*, 330 U. S. 258, 293, it was observed that there is:

> "[I]mpressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."

To the same effect see: *Nelson* v. *Steiner,* 7 Cir., 279 F. 2d 944, 948 and *Land* v. *Dollar,* D. C. Cir., 190 F. 2d 366, 379.

Without extending this opinion to detail the background the record portrays as the setting in which the appellant's refusal to obey the November 9, 1965, order occurred, or the conduct and statements of the appellant, suffice it to state that the record overwhelmingly evidences an intentional, deliberate, willful and contumacious defiance of the court's order, and a contemptuous disrespect for orderly execution of judicial process. In appellant's own words he arrogantly assumed the position that:

> "I am the boss of this lawsuit and things are going to be done different from here on out."

The conduct of the appellant and his statements make apt the observation in *Raymond Ballroom Co.* v. *Buck,* 1 Cir., 110 F. 2d 207, 211, that:

> "Surely the courts are not powerless to deal with such contumacious acts as here took place; otherwise disrespect for the orderly execution of writ and process would become rampant and the efforts of court officers to discharge their duties might with impunity be turned into a burlesque."

The District Court's award of $2500 to the appellee to cover expenses, losses and other damages accrued as of the date of its January 7, 1966 order is amply justified by the record. The amount allowed is neither unwarranted nor excessive. There is detailed testimony supporting the reasonableness of the attorneys fees incurred by the appellee as a result of appellant's contumacious and persistent refusals to abide the orders of the court and his efforts to harass the appellee. Those fees alone amounted

to more than the $2500 allowed. In addition, the record discloses that appellee incurred other disbursements relating to the litigation necessitated by the appellant's conduct.

The flagrant and contumacious character of the appellant's defiance of the court's orders makes its appropriate that appellee be reimbursed for items of expenses necessarily incurred on appeal to this Court in defending the contempt adjudication of the District Court. *Schauffler* v. *United Association of Journeymen,* 3 Cir., 246 F. 2d 687. Cf. *Nelson* v. *Steiner,* 7 Cir., 279 F. 2d 944, 948.

Accordingly, the judgment orders of the District Court appealed from are reaffirmed with interest on the $2500 awarded the appellee, Howard R. Reuland, computed at the rate of 5% per annum from January 7, 1966, until the award is paid; costs on appeal, including the cost of the additional transcript of record and the cost of printing the additional appendix filed by the appellee, are allowed to the appellee, Howard R. Reuland, and shall be taxed against the appellant, Russell W. Borrowdale; and the cause is remanded to the District Court with instructions to proceed to ascertain and to award to Howard R. Reuland and against Russell W. Borrowdale, by supplemental order, such amount as will reimburse Howard R. Reuland for his reasonable expenses incurred in the defense of this appeal, including reasonable attorneys fees and other items of litigation expense exclusive of those taxed herein as costs, and for the loss of use of the 13 foot Boston Whaler (dinghy), the brackets for same, and the two fish-fighting chairs, occasioned by continued failure of Russell W. Borrowdale to deliver said articles to Howard R. Reuland, or his agent.

To the extent above provided, the motion of the appellee

filed herein October 5, 1966, for the award of interest, damages, costs, and reimbursement of expenses incurred in the defense of this appeal, which motion was taken with the case at the time of oral argument, is allowed. [3]

AFFIRMED AND REMANDED WITH INSTRUCTIONS.

3. Motions by appellee to dismiss the appeal filed April 22, 1966 and May 26, 1966, respectively, and ordered taken with the appeal at the time of oral argument, are dismissed as being moot. A motion by appellee that an order of the District Court dismissing Civil Action No. 65 C 114, *Transamerica Leasing Corporation* v. *The Oil Screw HAPPY PAPPY*, be made a part of the record herein, is denied.

Office Supreme Court, U.S.
FILED
FEB 16 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966.

No. 994

RUSSELL W. BORROWDALE,
*Petitioner,*

*vs.*

HOWARD R. REULAND,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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### STATUTES INVOLVED.

Section 401 of the Criminal Code, 62 Stat. 701, 18 U. S. C. 3214 (1958 ed.) provided as of the dates involved in this case:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the adminstration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Petitioner fails to mention that Rules 9 and 10 of the Rules of Practice in Admiralty and Maritime Cases were rescinded, effective July 1, 1966, by order of this Honorable Court, dated February 28, 1966, as part of the unification of Civil and Admiralty proceedings.

## STATEMENT OF CASE.

The Petitioner seeks review of an order adjudging him guilty of civil contempt.

In addition to the facts of the case as stated by Petitioner (P. Br. pp. 3-7), the following facts should be noted:

1. Petitioner, Russell W. Borrowdale, was custodian of the vessel Happy Pappy and her *appurtenances* for the period from July 10, 1964, when the vessel, her engines, boilers, machinery, tackle, apparel and furniture, were seized by the U. S. Marshal (R. A. 8), until September 29, 1965, when the District Court, after hearing evidence on the issues of ownership and the right to possession of the Happy Pappy, entered findings of fact, conclusions of law, and a decree and order, declaring Howard Reuland the lawful owner and entitled to possession of the vessel and her appurtenances (B. A. 11; R. A. 46-48).

Russell Borrowdale had been appointed the custodian of the Happy Pappy by virtue of two orders entered in the District Court pursuant to the stipulation of the parties (R. A. 13-14, 19-20). The first stipulated order expressly provided that Borrowdale was to be custodian not only of the Happy Pappy, but also of her "engines, tackle, apparel, fixtures and furniture," and that technical custody of the vessel was to remain with the U. S. Marshal (R. A. 13-14). The order further provided that the Marshal might at any time during the litigation below "retake and resume possession of said boat at his own initiative, on the written

request of either of the parties, or upon order of the above-entitled Court" (R. A. 13-14).

2. On September 30, 1965, the day after the Court had declared Howard Reuland to be the lawful owner and entitled to possession, Russell Borrowdale delivered possession to Mr. Reuland. Upon inspecting the vessel, Mr. Reuland discovered that numerous pieces of equipment were missing, including a 13-foot Boston Whaler, brackets for same and 2 fish-fighting chairs (R. A. 48-49). These items had been aboard when Russell Borrowdale obtained possession of the vessel in 1963 in Mexico (R. A. 61); they were aboard when Mr. Borrowdale brought the vessel from Mexico to Chicago (B. A. 61); and, although there was a conflict in his testimony, Mr. Borrowdale, on one occasion in the proceedings below, admitted that the objects in question had been aboard the Happy Pappy when seized by the Marshal (R. A. 61).

3. On October 1, 1965, the day after discovering that the equipment was missing, Howard Reuland moved for an order directing Russell Borrowdale to show cause why he should not be held in contempt for his removal of the Boston Whaler, brackets and fish-fighting chairs. Subsequently, a second rule to show cause was entered against Mr. Borrowdale as a result of his leading the United States Marshal to believe that Borrowdale, not Reuland, had been declared the owner of the vessel, thus causing the Marshal to arrest Mr. Reuland and remove him from the vessel. A hearing on these rules to show cause was held on October 8, 1965.

4. After testimony was presented at the October 8th hearing, the Court recessed to permit a conference between the proctors for Mr. Reuland and Mr. Borrowdale. Following this recess, the then proctor for Mr. Borrowdale, William K. Johnson, stated to the Court that the par-

ties had reached an agreement which would resolve the contempt matter (B. A. 59). Mr. Johnson stated to the Court that the Boston Whaler, brackets and fishing gear would be turned over to Mr. Reuland, and Mr. Borrowdale would be allowed to assert a lien against the vessel for the value of these items, in addition to certain other liens he had previously claimed against the vessel (B. A. 59-60). Mr. Johnson stated this agreement would be incorporated in an order to be presented to the Court (B. A. 59). After the proctors for Claimant Reuland stated that this arrangement was satisfactory to them, the District Court Judge, the Honorable Bernard M. Decker, discharged the rules to show cause (B. A. 60).

5. As admitted by Claimant Borrowdale, an order incorporating the agreement of October 8, 1965 was never presented. Numerous efforts followed, not material here, to induce Mr. Borrowdale to deliver the Boston Whaler, brackets and fish-fighting chairs, without the necessity of obtaining additional court orders (B. A. 22-24; R. A. 99-101). Finally, when these efforts proved unsuccessful, on November 9, 1965, the proctors for Claimant Reuland again appeared before Judge Decker (R. A. 79) and obtained an order directing the United States Marshal to obtain possession of this equipment from Mr. Borrowdale, and to deliver it to Mr. Reuland (B. A. 25). Mr. Borrowdale's proctor, William K. Johnson, also appeared on that date and stated that there was no objection to the entry of the order (R. A. 79). The order of that day, November 9, 1965, specifically stated the Boston Whaler, brackets and fish-fighting chairs were in the custody of the Court.

6. Thereafter, a particularly frustrating period began for the proctors for Claimant Reuland in their efforts to recover the property in question. They experienced considerable difficulty in locating and serving Mr. Borrowdale with a copy of the Court's order, and the directive

from the Marshal, commanding Mr. Borrowdale to deliver the property. These efforts are detailed in Appellee's Appendix below (R. A. 25-29; R. A. 91-97, 99-101). Finally, on November 18, 1965, one of the proctors for Claimant Reuland, Jonathan G. Bunge, a Deputy U. S. Marshal, Arthur Wilson, an agent for Howard Reuland, William Fournier, and a truck driver, Harry Schwartz, went to the R. W. Borrowdale Company at 250 West 83rd Street in Chicago to obtain the property (R. A. 27-94). Mr. Bunge and the truck driver arrived first and spoke with Mr. Borrowdale, explaining the purpose of their visit (R. A. 27-94). Mr. Borrowdale replied (R. A. 27-94):

> "I am the boss of this law suit and things are going to be done different from here on out."

Mr. Borrowdale insisted that an additional bond be posted or he would not deliver the property. Subsequently, the Deputy Marshal arrived. The Deputy Marshal attempted to proceed with the service of a copy of the directive and the order of November 9, 1965, but he was interrupted by Mr. Borrowdale who stated that he would not deliver the property until an additional bond was posted (R. A. 23, 95-96). Mr. Borrowdale then turned to leave; however, the Deputy Marshal stopped Mr. Borrowdale and showed him copies of the Court's order and the directive (R. A. 28, 96), and then handed copies of these documents to Mr. Borrowdale (R. A. 28, 96). The Deputy Marshal asked Mr. Borrowdale to deliver to Mr. Fournier, as Mr. Reuland's agent, the fish-fighting chairs, Boston Whaler, and brackets (R. A. 28, 96). Mr. Borrowdale declined (R. A. 28, 96). The Deputy Marshal asked Mr. Borrowdale (R. A. 28, 96):

> "Are you refusing to delivery this property?"

Mr. Borrowdale replied (R. A. 28, 96):

> "Yes."

Mr. Borrowdale turned to Mr. Bunge (Mr. Reuland's proctor) and stated that he was worth $4,000,000, that Mr. Bunge was not, and that he knew more about the legal status of this matter than did Mr. Bunge (R. A. 28-29). After this statement Mr. Bunge, Deputy Marshal Wilson and Messrs. Fournier and Schwartz left the Borrowdale plant (R. A. 29).

7. The following day, November 19, 1965, the third and last petition for an order to show cause was presented to Judge Decker (B. A. 26-28; R. A. 80-82). After a delay of several weeks, caused by Mr. Borrowdale changing counsel and later his contracting intestinal flu, a hearing was held on December 10, 1965. At the December 10th hearing, the only conflict in the testimony related to whether there had been an agreement to post an additional bond with respect to the Boston Whaler, brackets and fish-fighting chairs. Athough there was some difference in their testimony, Russell Borrowdale and an employee of his company, Benjamin F. Pfeifer, testified that on October 8, 1965, the same date on which Mr. Johnson had represented to the Court that his client would turn over the equipment to Mr. Reuland, there had been an "agreement" about which the Court had not been advised by Mr. Johnson or anyone else (B. A. 62-74). This "agreement," said Mr. Borrowdale, was made directly with him and required Mr. Reuland to post an additional bond of $3,000 before obtaining possession of the Boston Whaler, brackets and fish-fighting chairs (B. A. 74). Mr. Borrowdale testified that he had not turned over the property because the "agreement" had not been honored.

Following this testimony, one of Mr. Reuland's proctors, Edward S. Silber, stated, as an officer of the Court, that no agreement of any kind had been made directly with Mr. Borrowdale on October 8, 1965, and further that he and Mr. Bunge had refused even to confer with Mr. Bor-

rowdale on that date because they believed that any settlement would be impossible if Mr. Borrowdale were included in the settlement discussions (R. A. 97). Mr. Bunge also testified under oath that there had not been any such agreement and that he had never heard of a request for an additional bond until he went to the Borrowdale plant on November 19, 1965 (R. A. 99-101).

Mr. Borrowdale admitted that service of the Court's order and Marshal's directive had been made upon him as stated above, and that he had refused to obey the order. His only claimed justification for not obeying the order was the failure to provide the alleged bond.

Following the conclusion of testimony on December 10, 1965, Judge Decker stated to Mr. Gordon, Mr. Borrowdale's new counsel (R. A. 102):

> "But what bothers me about your client is that having, in effect, defied the order of the Court and defied the Marshal, and in effect, taking the law into his own hands, I have also reached the conclusion that in making the statement that he has made here from the witness stand, that he committed perjury as well."

Subsequently, the Court ordered Mr. Borrowdale to deliver the 13-foot Boston Whaler, brackets and 2 fish-fighting chairs within five (5) days, ordered him to pay a fine of $2,500.00 to Howard Reuland as compensation for his loss, expenses and damages, and further ordered that, if Russell Borrowdale failed to deliver the property and pay the fine within five (5) days, he would be imprisoned until he complied with the Court's order.

## ARGUMENT.

### A. THIS IS A SIMPLE CASE OF CIVIL CONTEMPT WITH NO SIGNIFICANT LEGAL OR FACTUAL QUESTIONS.

The significant facts for the purposes of this appeal are not contested or even questioned. Russell W. Borrowdale continually refused to comply with and resisted the enforcement of orders entered by the Honorable Bernard M. Decker, Judge of the United States District Court for the Northern District of Illinois. This defiance of Judge Decker was not an isolated, unknowing or inadvertent occurrence; it was intentional, deliberate and willful, and part of a conscious and continued scheme to thwart the Court's decree. *United States* v. *Schine,* 260 F. 2d 552 (2d Cir., 1959).

On September 29, 1965, Judge Decker ruled Howard Reuland was the owner and entitled to possession of Happy Pappy, including her appurtenances (B. A. 11). By seizure and stipulation of the parties, these items were in the constructive custody of the Court. Mr. Borrowdale stipulated that he would hold the property for the benefit of all parties to the action. This stipulation also provided that the Marshal could retake possession at any time upon order of Court (R. A. 13-14). On October 8, Mr. Borrowdale's proctor, in Borrowdale's presence, stated to the Court that Mr. Borrowdale would deliver the property to Mr. Reuland. Finally, on November 9, 1965, in the presence of Mr. Borrowdale's proctor who voiced no objection, Judge Decker ruled that the Boston Whaler, brackets and fish-fighting chairs were to be delivered to Mr. Reuland (B. A. 25). Nevertheless, on November 18, 1965, despite all of the foregoing, when confronted by a Deputy Marshal and di-

rected to deliver these items, Mr. Borrowdale refused (B. A. 70; R. A. 28, 96).

Section 401 of Title 18 of the United States Code provides that a Court of the United States has the power to punish by fine or imprisonment any contempt of its authority, including:

> "Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

It is well established that an order issued by a Court with jurisdiction over the subject matter and persons must be obeyed by the parties, even though the persons affected may believe the order to be improper. *United States* v. *United Mine Workers of America,* 330 U. S. 258 (1947); *Howat* v. *Kansas,* 258 U. S. 181 (1922); *Nelson* v. *Steiner,* 279 F. 2d 306 (7th Cir., 1960); *United States* v. *Schine,* 260 F. 2d 552 (2nd Cir., 1959); *National Labor Relations Board* v. *American Manufacturing Co.,* 132 F. 2d 740 (5th Cir., 1943).

Russell Borrowdale's behavior constituted contempt because it was disobedience of and resistance to Judge Decker's orders; it was contempt because it constituted interference with property in the custody of the Court, *Denver-Greeley Valley Water Users Ass'n.* v. *McNeil,* 131 F. 2d 67 (10th Cir., 1942); it was contempt because it was resistence to a lawful writ or process of the Court. *Raymor Ballroom Co.* v. *Buck,* 110 F. 2d 207 (1st Cir., 1940).

## B. THE ARGUMENTS RAISED BY PETITIONER FURNISH NO BASIS FOR GRANTING THE EXTRAORDINARY RELIEF HERE REQUESTED.

### I.

Petitioner's argument based on former Rule 9 of the Rules of Practice in Admiralty and Maritime Cases is clearly fallacious and provides no basis for a grant of certiorari. Petitioner argues there was not compliance with Rule 9 because the trial court failed to hold a hearing before entering the order of November 9, 1965. However, Rule 9 only established a procedure by which a court could obtain custody of items not previously in custody. The rule had no application in a case where, as here, the items in question were already in the custody of the District Court by virtue of the seizure of the vessel by the Marshal and the stipulation and agreement of the parties. Moreover, as the record clearly shows, any real or imagined need for a hearing became unnecessary when counsel for Claimant Borrowdale appeared on November 9, 1965, and allowed the entry of the delivery order without objection.

Furthermore, Admiralty Rule 9 was rescinded effective July 1, 1966, and supplanted by the new unified civil and admiralty procedures. Admiralty Rule 9 has been incorporated into new Rule C(5) entitled: "Ancillary Process." A comparison of old Rule 9 and new Rule C(5) shows that the language of the old rule has been drastically altered and that there would be no value in construing old Rule 9 as a guide for cases involving new Rule C(5).

### II.

Petitioner's argument regarding Rule 10 is unclear. The Court of Appeals did not address itself to the question of whether or note Rule 10 had been complied with; this was

because a discussion of this question was completely unnecessary to dispose of the appeal. The Court specifically stated that it was not necessary to resolve such questions because all necessary jurisdiction over the res was conferred by the waiver and consent implicit in Borrowdale's agreement in open court to deliver these articles to Mr. Reuland and his further agreement that an order directing delivery might be entered. That jurisdiction over a res can be provided by stipulation and waiver is well-established. *Reed* v. *Steamship Yaka,* 307 F. 2d 203, 204-205 (3rd Cir., 1962), rev'd on other grounds, 373 U. S. 410 (1963).

Moreover, like Rule 9, Rule 10 has now been rescinded; it has been supplanted by sub-sections (3) and (4) of new Rule C. The language of the new rule is radically different from that of the old and a construction of the old rule would be of no assistance in future cases.

## III.

To support his third argument Petitioner quotes out of context an isolated statement made in *J. K. Welding Co., Inc.* v. *Gotham Marine Corporation,* 47 F. 2d 332 (S. D. N. Y., 1931). A reading of the entire decision reveals the Court's position to have been merely that when an action is brought *in rem,* the Court cannot enter a final decree *in personam* against the claimant of the vessel, because no relief was sought against the claimant. This is quite different from a holding, as Petitioner intimates, that the same court has no contempt power over a claimant or custodian of a vessel. Thus, there is no conflict between the Court of Appeals for the Seventh Circuit and the District Court for the Southern District of New York. Although Petitioner maintains there are other, *unnamed* conflicts between the Court of Appeals for the Seventh Circuit and this Hon-

orable Court, a diligent search fails to reveal any such conflicts.

Petitioner's argument is not only without support in the authorities, but contrary to good sense. If Petitioner's argument were adopted, a court which entrusted property to a custodian would be powerless to use its contempt powers to punish or otherwise reprimand such custodian if he absconded with such property, destroyed it or committed other wrongful acts. Merely to state such a dubious proposition demonstrates its fallacy.

## IV.

Petitioner's final argument deals entirely with factual matters, i.e. whether the burden of proof was sustained and whether the findings were supported by clear and convincing evidence. On these matters the Court of Appeals accurately stated (P. Br. p. 20):

> "The record overwhelmingly evidences an intentional, deliberate, willful and contumacious defiance of the Court's order, and a contemptuous disrespect for orderly execution of judicial process."

It is well-established that this Honorable Court does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U. S. 220, 227 (1925). This is particularly true where, as here, the evidence has already been reviewed by a court of appeals. *Graver Manufacturing Co.* v. *Linde Co.,* 336 U. S. 271, 275 (1949) and cases there cited.

## CONCLUSION.

For the reasons stated it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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